NO. 91-293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER,
v.
JOSE HERNANDEZ, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HOWARD P. NEWTON
Counsel of Record
LEO D. FIGUEROA
ROBERT SHAW-MEADOW
Counsel for Petitioner

Matthews & Branscomb, P.C.
One Alamo Center, Suite 800
106 South St. Mary's Street
San Antonio, Texas 78205-3692
(512) 226-4211

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Petitioner, Southern Pacific Transportation Co. ("Southern Pacific"), asks that the Court consider this Reply Brief in Support of its Petition for Writ of Certiorari, pursuant to Supreme Court Rule 15.6.

I.

Respondent Has Misconstrued The Issue Facing The Court.

Respondent contends in his Response to the Petition for Writ of Certiorari (hereinafter "Response") that the issue before the Court is whether "the *Liepelt* instruction [is] subject to a harmless error standard of review, as all other

jury instructions are, or will an exception to the harmless error rule be created for *Liepelt* instructions?" Response at i.

This statement of the issue misses the point. Any failure to instruct a jury is subject to a harmless error test. The real issue is what constitutes harmless error and whether a defendant in an FELA case must affirmatively show that the jury improperly inflated the size of its award by taking imaginary taxes into account in order to show it was harmed by an erroneous refusal of the instruction.

Nor does Petitioner claim "that the Supreme Court has ignored 28 U.S.C.A. § 2111 and has held that the harmless error rule does not apply to F.E.L.A. cases." Response at 10. The point of the Petition is that *Liepelt* presumed harmful error as a result of the trial court's failure to give the instruction. *Liepelt* reversed the judgment for this failure to instruct without a direct showing that the jury improperly inflated its award because of a mistaken understanding of the award's taxability. 444 U.S. 497–98. See also, *O'Byrne v. St. Louis S.W. Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980) ("*Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction.").

Respondent also claims that *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) supports the notion that the failure to give a *Liepelt* instruction is harmless error. "If the Court [in *Gulf Offshore*] was of the opinion . . . that it was not necessary to show harm, the Court would have said so; the Court would not have wasted the state court's time by ordering it to address the argument." Response at 12. This novel argument ignores the issue in *Gulf Offshore*, and the

fact that the Court did not decide whether a *Liepelt* instruction was required.

The claim in *Gulf Offshore* was governed by the Outer-Continental Shelf Lands Act ("OCSLA") rather than the FELA. The source of law in a FELA case is the federal common law articulated in *Liepelt*. *Gulf Offshore*, 453 U.S. at 486. OCSLA contains a choice of law provision mandating the application of state laws "to the extent that they are applicable and not inconsistent with this subchapter or other federal laws . . ." *Id.* at 485. In *Gulf Offshore* the Court had to consider whether the incorporation of Louisiana law in OCSLA would make a difference in the outcome of the case, but most definitely did not decide whether a *Liepelt* instruction was required.

The Court held that the lower court erred when it failed to consider whether Louisiana law required a *Liepelt* instruction. If it did not, the lower court would have to resolve whether OCSLA incorporated Louisiana law in this regard, or whether the Louisiana rule was displaced by *Liepelt*. 453 U.S. at 488 and n.18. The Supreme Court's directive to the lower court to first decide whether Louisiana required a *Liepelt* instruction is not an issue in this case, where it is undisputed that *Liepelt* applies. Respondent's argument is oblivious to this distinction.

Moreover, the Court went out of its way to state that had the issue been one of federal law under the FELA, rather than Louisiana law as incorporated by OCSLA, it would have reversed for the failure to give the instruction: "If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given." 453 U.S. at 485, n.15, 486-87.

Respondent's contention that the remand to state court proves federal law does not require the non-taxability instruction unless there is an affirmative showing of improper jury inflation also ignores the subsequent decision on remand. The Texas Court of Appeals understood that the purpose of the Supreme Court's remand order was to decide whether Louisiana law required a *Liepelt* instruction, and if it did not, whether OCSLA incorporated Louisiana law or the federal rule. 628 S.W.2d 171, 174 (Tex. App.--Houston 1982, writ ref'd n.r.e.), cert. denied, 459 U.S. 945 (1982). The Texas court determined that *Liepelt* did not apply to an action brought under OCSLA because Louisiana law controlled. *Id.* at 175.

Gulf Offshore does not establish a new rule beyond *Liepelt* requiring the non-taxability instruction only upon an affirmative showing of improper inflation by the jury. To the contrary, *Gulf Offshore* supports Southern Pacific's position that no such affirmative showing is necessary, because it cites with approval the reasoning in *Liepelt* that no such showing is necessary or possible. 453 U.S. at 487, n.17.

While Petitioner maintains that both *Liepelt* and *Gulf Offshore*, support reversal here because no showing of improper inflation of the verdict is required to demonstrate harm, it is on this issue that the lower federal and state courts are divided. Even the Texas appellate court from which Petitioner appeals recognized this conflict. *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. App. --San Antonio 1991, writ. denied), petition for cert. filed.

The clear language of *Liepelt* has inexplicably been disregarded by a small but significant number of lower state and federal courts. See generally, Brief Amicus Curiae of the

Association of American Railroads in Support of Petitioner (hereinafter "Brief Amicus Curiae") at 4–8. The Petition should be granted to reaffirm the important principle that the failure to give a *Liepelt* instruction is harmful error, and put to rest continuing doubts in this regard in the lower courts. In short, it is always reversible error for a trial court in an FELA case to refuse a non-taxability of award instruction, and Respondent's argument that Southern Pacific advocates abandonment of the harmless error standard of review is simply a misguided attempt to raise an issue having nothing to do with this appeal.

II.
Respondent Does Not Address The Conflict In Authorities Which Supports Granting The Writ.

Only by misconstruing the issue presented for review can Respondent make the claim that "there is no conflict between the holding of the appellate court and the relevant federal authority." Response at 5. This claim also flies in the face of the Texas appellate court's acknowledgement of a direct conflict between *O'Byrne* and *Flanigan v. Burlington N. Inc.*, 632 F.2d 880 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981). The Texas appellate court recognized that following *O'Byrne* would require a different result. 804 S.W.2d at 561.

None of Respondent's other arguments address the propriety of granting certiorari to resolve this conflict. Instead, Respondent argues the merits of whether reversible error occurs absent a showing from the face of the jury's verdict that the award was improperly inflated.

It also appears that Respondent has not carefully read Southern Pacific's Petition. For example, Respondent incorrectly claims that Petitioner cites only two cases that conflict with the holding in this case and its supporting authorities. Response at 16. Respondent overlooked relevant post-*Liepelt* cases from the Tenth and Seventh Circuit Courts of Appeals which reversed judgments for denial of non-taxability of award instructions without any showing that the juries improperly inflated the awards.[1] *In re Air Crash Disaster Near Chicago*, 803 F.2d 304, 313 (7th Cir. 1986); *Fulton v. St. Louis-S.F. Ry.*, 675 F.2d 1130, 1134 (10th Cir. 1982). Fourteen state courts have also considered whether the failure to give a non-taxability of award instruction is harmless error absent a showing that the verdict was improperly inflated. See Brief Amicus Curiae 4-8. Four state courts have followed *O'Byrne*, reasoning that no showing of inflation is required, and ten have followed *Flanigan*, holding that error for failure to give the instruction is harmless without a showing that the verdict was inflated.

In view of this manifest conflict that has emerged in the decade since *Liepelt* was decided, this Court should

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[1]Instead of addressing this relevant post-*Liepelt* authority, Respondent relies on seven federal appellate decisions, four of which were decided by the Eighth Circuit Court of Appeals. See Response at 13-16. More significantly, only three of the cases, all from the Eighth Circuit, were decided after *Liepelt*. Respondent's reliance on these cases reaches the merits of whether the lower Texas court's decision was correct and misses the point of whether this Court should grant the Petition to resolve the conflict in authority. Assuming that the four pre-*Liepelt* cases relied on by Respondent from the Second, Third, Eighth and Ninth Circuits are somehow relevant, the conflict in authority is actually more extensive than represented by Petitioner, and the reasons for granting the writ are commensurately stronger.

establish a uniform national standard for determining when, if ever, *Liepelt* error can be deemed harmless.

III.
Petitioner Did Not Fail To Preserve Error Below.

Respondent claims that Southern Pacific failed to preserve error because "the requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case." Response at 6–9.

This issue was fully briefed and argued to the Texas intermediate appellate court. The appellate court concluded, however, that: "it was erroneous for the trial court to fail to instruct on the non-taxability of the award." *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d at 561.

The appellate court below did not byase its holding on the asserted deficiencies in the requested instruction. Instead, it reached the broader issue of whether failure to give the instruction was reversible error, and held that the trial court's error was harmless because Hernandez's expert witness had deducted income taxes from his lost earnings calculations and the jury's verdict apparently was not improperly inflated because it was lower than the highest values assigned by the economist. 804 S.W.2d at 562.

The trial court's failure to give a *Liepelt* instruction presents an issue of federal substantive law. *Liepelt*, 444 U.S. at 492–93. Respondent's waiver argument disregards this fact, and, as a result, ignores this Court's authority to

review important federal questions actually decided by state courts.[2]

Where the state court actually rules on a federal question, as it did here, Supreme Court review of the federal question is proper irrespective of whether the issue was preserved below by the appellant. E.g., *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Raley v. Ohio*, 360 U.S. 423, 436 (1959); see also, *Stevens v. Department of Treasury*, 111 S. Ct. 1562, 1567 (1991) (applying rule to issue decided by federal trial court).

Respondent's claim that Southern Pacific's requested instruction was an incorrect statement of the law, even if relevant, is untrue.[3] Respondent raises no challenge to the

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[2]Even under Texas law, the appellate court's decision to reach the harmless error issue reflects a determination by the court that the requested instruction was in substantially correct form sufficient to preserve error. Tex. R. Civ. P. 278.

[3]For the Court's convenience, the full text of Petitioner's requested instruction as reproduced below:

> Under the law, any award made to the Plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past, or will lose in the future.

At trial, Respondent raised no objection to the form of Southern Pacific's requested instruction. Instead, Respondent's trial counsel erroneously claimed that state substantive law controlled whether the non-taxability instruction was required, relying incorrectly on *St. Louis*

first sentence of the instruction, which is clearly authorized, if not mandated, by *Liepelt*. The second sentence also is not objectionable because it merely explains the proper procedure for calculating lost earnings, and Respondent's expert witness testified at trial that he followed this method.

Respondent's challenge is based on the alleged confusion caused by the phrase "take-home pay" in the third sentence of the requested instruction. Respondent claims that the requested instruction incorrectly applied the law to the facts of the case because it told the jury not to make any award for fringe benefits, and it encouraged use of a "take-home pay" figure of $20,263.91, which was considerably less than the "after-tax income" figure utilized by Respondent's economist. Response at 1-3; 5-9.

Even assuming that the third sentence of the instruction is ambiguous, there was no evidence presented at trial that made the instruction incorrect as applied to the facts. First, contrary to Respondent's allegation that "[t]he evidence during trial was very clear that Hernandez's net, after-tax income was not the same as his take-home pay," Response at 5 [original emphasis], there was no evidence presented of any after-tax income or take-home pay figure less than Respondent's expert's testimony. In fact, the only mention of the $20,263.91 figure trumpeted by Respondent occurred in a question asked by Petitioner's trial counsel. Statement of Facts (Vol. III) at 61-63. No evidence supporting such a figure was ever introduced. Second, contrary to Respondent's

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Southwestern Ry. Co. v. Greene, 552 S.W.2d 880, 884-85 (Tex. Civ. App--Texarkana 1977, no writ), which found no error in denial of a non-taxability instruction as a matter of Texas law. Statement of Facts (Vol. III) at 212-123. This position has since been abandoned by Respondent.

claim that "Hernandez's loss of fringe benefits was included in Dr. Dillman's analysis of Hernandez's loss of earning capacity," Response at 2, the expert's opinion did not include fringe benefits in the lost earnings calculation. In fact, as Respondent recognizes, Dr. Dillman arrived at a net after-tax income figure of approximately $29,000.00[4] by starting with Hernandez's gross earnings of $32,347.00 (as reported to the Internal Revenue Service for tax year 1986) and subtracting income taxes paid of $3,162.00. Fringe benefits of 26% were never factored back into this calculation. Accordingly, even if the proposed instruction is interpreted as excluding fringe benefits, it was not incorrect because fringe benefits were not included in any of the expert's calculations.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted and the opinion of the Texas intermediate appellate court reversed.

Respectfully submitted,

HOWARD P. NEWTON
Counsel of Record
LEO D. FIGUEROA
ROBERT SHAW-MEADOW
Counsel for Petitioner

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[4]Respondent states that Dillman used a figure of $28,245.00 as Hernandez's net after-tax income. Response at 2. In fact, at trial Dillman testified the figure was approximately $29,000.00.